

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM URAL NEEL

Plaintiff,

vs.

THEODORE D'AMICO, ET AL.

Defendants.

3:06-CV-0021-PMP (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

March 29, 2007

This Report and Recommendation is made to the Honorable Philip M. Pro, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#55). Also before the court is defendants' request for submission of unopposed motion for summary judgment (#60). Plaintiff filed nothing in opposition to either motion. The court has thoroughly reviewed the record and the motions and recommends that defendants' motions (#55 and #60) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff William Ural Neel ("plaintiff"), a *pro se* prisoner, is currently incarcerated in the custody of the Nevada Department of Corrections ("NDOC") at Lovelock Correctional Center ("LCC") (#13). Plaintiff brings his complaint pursuant to 42 U.S.C. § 1983 for violations of his and other NDOC prisoners' Eight Amendment right to be free from cruel and unusual punishment and Fourteenth Amendment right to due process (#4). Plaintiff names as defendants Theodore D'Amico, NDOC Medical Director and Glenn Whorton, NDOC Director. *Id.* Plaintiff also seeks injunctive relief against the Nevada Board of Prison Commissioners and NDOC. *Id.*

In count I, plaintiff alleges that defendants violated his Eighth Amendment rights by being

1 deliberately indifferent to his and other prisoners' medical concerns. *Id.* The allegations are that
2 defendants have denied NDOC prisoners adequate medical care by, among other things,
3 instituting policies which have eliminated certain medications and treatments, allowing long
4 waiting periods to receive required medications, denying prisoners their required medication for
5 no reason, and refusing to treat chronic conditions through medication or surgery. *Id.*, Exhibit
6 A. In count II, plaintiff alleges that he has a state-created liberty interest in being free from
7 defendants' deliberate indifference, and that defendants have denied him the right to a hearing,
8 which violates his Fourteenth Amendment right to due process. *Id.*

10 On January 11, 2006, plaintiff filed a motion for leave to proceed *in forma pauperis* and
11 attached his civil rights complaint (#1). The court screened plaintiff's complaint and filed it on
12 February 13, 2006 (#4). Plaintiff filed a motion to certify a class action (#5), which the court
13 denied. *See* #s 46, 48 and 54.

15 On September 15, 2006, the defendants filed a motion for summary judgment (#55). On
16 September 18, 2006, the court sent plaintiff its standard *Klingele* Order, which informs plaintiffs
17 of the requirements for opposing a dispositive motion (#58). The order gave plaintiff fifteen days
18 to file an opposition. *Id.* Plaintiff failed to submit any opposition. On November 16, 2006, the
19 court *sua sponte* granted plaintiff "one **final** extension to Friday December 15, 2006" to file an
20 opposition to defendants' motion for summary judgment, and warned plaintiff that the failure to
21 submit an opposition would result in the defendant's motion being submitted to the court for
22 decision (#59). After plaintiff failed to file an opposition, defendants filed a motion on December
23 19, 2006 for submission of their unopposed motion for summary judgment (#60). Plaintiff did
24 not file a response.

27 The Court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the
28

1 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff
 2 the benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th
 3 Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

4 II. DISCUSSION & ANALYSIS

5 A. Discussion

6 1. Summary Judgment Standard

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 8 Summary judgment allows courts to avoid unnecessary trials where no material factual
 9 disputes exist. *Northwest Motorcycle Ass’n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th
 10 Cir. 1994). The court grants summary judgment if no genuine issues of material fact remain in
 11 dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C).
 12 In deciding whether to grant summary judgment, the court must view all evidence and any
 13 inferences arising from the evidence in the light most favorable to the nonmoving party. *Bagdadi*
 14 *v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). In inmate cases, the courts must
 15

16
 17 [d]istinguish between evidence of disputed facts and disputed
 18 matters of professional judgment. In respect to the latter, our
 19 inferences must accord deference to the views of prison
 20 authorities. Unless a prisoner can point to sufficient evidence
 regarding such issues of judgment to allow him to prevail on the
 merits, he cannot prevail at the summary judgment stage.

21 *Beard v. Banks*, ___ U.S. ___, 126 S.Ct. 2572, 2576 (2006). Where reasonable minds could differ
 22 on the material facts at issue, however, summary judgment should not be granted. *Anderson v.*
 23 *Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

24
 25 The moving party bears the burden of informing the court of the basis for its motion, and
 26 submitting evidence which demonstrates the absence of any genuine issue of material fact.
 27 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
 28

1 the party opposing the motion may not rest upon mere allegations or denials in the pleadings but
2 must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477
3 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time for
4 discovery, against a party who fails to make a showing sufficient to establish the existence of an
5 element essential to that party's case, and on which that party will bear the burden of proof at
6 trial. *Celotex*, 477 U.S. at 322-23.
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8 **B. Analysis**

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10 Defendants allege that because the court denied plaintiff's motion for class status, the only
11 viable claims are those particular to plaintiff (#55, p. 2). Defendants argue that plaintiff failed
12 to properly exhaust his administrative remedies because he did not complete the prison grievance
13 process prior to filing his complaint with this court. *Id.*, p. 7. Defendants further argue that
14 plaintiff fails to state a claim because he makes no factual allegations that any of the named
15 defendants had any direct involvement in ordering and dispensing his medication. *Id.*, p. 8.
16 Finally, defendants argue that there is no evidence that defendants acted with deliberate
17 indifference because plaintiff cannot prove that defendants acted with a culpable state of mind
18 or that he suffered harm that was "sufficiently serious." *Id.*, p. 10.
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20
21 Defendants submit an affidavit from Robert LeGrand, LCC Associate Warden, and copies
22 of plaintiff's administrative grievances. *Id.*, Exhibits B. The evidence demonstrates that plaintiff
23 failed to complete the full administrative grievance process prior to filing this action on January
24 11, 2006, because he filed his first level appeal that same day. *Id.*, Exhibit B, D-MSJ 48.
25 Plaintiff's second level appeal was not resolved until February 16, 2006. *Id.*, D-MSJ 40-41.
26 Additionally, plaintiff's first level appeal appears improper because he agreed with the result of
27 his informal grievance but then filed an appeal anyway. *Id.*, D-MSJ 51; *see also generally*
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1 Exhibit C.

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3 Defendants also submit an affidavit from Dr. John Scott, the Senior Physician at LCC, and
4 one of plaintiff's treating physicians at LCC, as well as copies of plaintiff's medical records (#57)
5 (sealed). A review of the evidence indicates that even if plaintiff was denied his medication for
6 a period of time, it does not appear plaintiff suffered any serious harm.

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8 Local Rule 7-2 states "The failure of an opposing party to file points and authorities in
9 response to any motion shall constitute a consent to the granting of the motion." L.R. 7-2(d). In
10 the *Klinge* order the court sent plaintiff, it stated:

11 If the nonmoving party fails to oppose the motion within fifteen
12 (15) days, or if the non-moving party fails to submit evidence
13 supporting its opposition, and if the motion for summary judgment
14 has merit, that failure to file points and authorities in response to
15 any motion shall constitute a consent to the granting of the motion.
Local Rule 7-2(d). The court may then grant the motion and enter
judgment. Local Rule 7-2(d).

16 (#58). Defendants motion has merit and plaintiff has been duly warned of the consequences of
17 failing to oppose it. Therefore, the court concludes that the plaintiff consents to each of the
18 defendants' arguments and grants summary judgment on all counts.

19 III. CONCLUSION

20 Based on the foregoing and for good cause appearing, the court concludes that plaintiff's
21 failure to oppose defendants' motion for summary judgment constitutes his consent to the
22 granting of that motion. Moreover, defendants' unopposed evidence indicates that: (1) plaintiff
23 failed to properly exhaust his administrative remedies prior to bringing his claim; and (2) plaintiff
24 does not appear to have suffered any serious harm. As such, the court recommends that
25 defendants' request for submission of unopposed motion for summary judgment (#60) and
26 defendants' motion for summary judgment be **GRANTED**.
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1 The parties are advised:

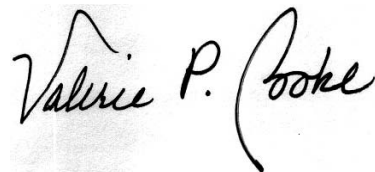
2
3 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
4 the parties may file specific written objections to this report and recommendation within ten days
5 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
6 Recommendation" and should be accompanied by points and authorities for consideration by the
7 District Court.

8
9 2. This report and recommendation is not an appealable order and any notice of appeal
10 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
11 judgment.

12 **IV. RECOMMENDATION**

13 **IT IS THEREFORE RECOMMENDED** that recommends that defendants' request for
14 submission of unopposed motion for summary judgment (#60) and defendants' motion for
15 summary judgment (#55) be **GRANTED**.

16
17 **DATED:** March 29, 2007.

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20 **UNITED STATES MAGISTRATE JUDGE**